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No. 440

Supreme Court of the United States

OCTOBER TERM, 1947

JOHN A. LAIRD, PETITIONER

v.

UNITED SHIPYARDS, INC., JOSEPH W. POWELL, HUBERT E. ROGERS, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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I

Substance of respondents' argument stated and replied to

Respondents argue in substance that the decision of the Circuit Court of Appeals does not breach the *Erie* doctrine by failing to apply the New York law in determining who were the original holders of the 450,000 shares because:

(a) United was not defrauded irrespective of who were the original holders of the 450,000 shares, and the suit was therefore barred by limitation in any event.

(b) Under New York law the bankers, not petitioner and the other purchasers, were the original holders of the 450,000 shares.

Each branch of this argument is fallacious.

(a) The Circuit Court of Appeals did not decide the case on the theory that United had not been defrauded irrespective of who were the original holders of the 450,000 shares. On the contrary, its decision was explicitly placed on the ground that as held by the District Court, all parties other than Powell and Rogers interested in United on its organization, *i.e.*, the bankers and the vendor companies, were fully aware of the facts (R. 1279). And underlying that and basic to this application is the conclusion, elaborately reasoned by the District Judge,[1] that petitioner and the other purchasers as a matter of law were not original stockholders.[2]

(b) Seeking to obscure the broad federal question which the petition presents and to make this application for *certiorari* appear to turn on a close question of New York law, respondents assert that the substan-

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[1] See petition, pp. 12-14.

Contrary to respondents' claims, the Circuit Court of Appeals did not "affirm all the facts found below" (Powell brief, p. 2). In that court's view, application of the statute of limitations required no more than affirmance of the District Court's conclusion that the acquiescing bankers, not petitioner and the other deceived purchasers, were the original holders of the 450,000 shares and that therefore the transaction complained of was known to all parties interested in United at the time of its organization (R. 1279).

Neither court went beyond this conclusion of law doubtless because the evidence of deceit in the sale of the shares was undisputed as to petitioner and virtually undisputed as to Baker-Scott. Petition, pp. 3-4.

[2] Since this was a determination of law, not fact, the "concurrent findings" rule on which respondents rely (Powell brief, p. 3, Chase brief, pp. 12-13), does not apply.

tive law of New York as to who were the original holders of the 450,000 shares of common stock is exactly contrary to what petitioner states it to be. On that basic question, argues The Chase,[3] the decision below is based on New York law, not on a doctrine of the lower federal courts which ignores the state rule.

This bold claim is utterly without foundation. *Blum* v. *Whitney*, 185 N. Y. 232, and the ten other cases which respondents cite on this point stand merely for the proposition stated at page 8 of the petition, in the margin, that the corporation may not complain of a transaction assented to by those who at the time own all of its stock. As made clear in *Goldstein* v. *Tri-Continental Corp.*,[4] N. Y. Law Journal, June 21, 1938, that principle of course, does not apply where, as here, at the time of the transaction, the corporation has non-assenting stockholders. Overruling a demurrer to the complaint in that case, Mr. Justice SHIENTAG (now a justice of the Appellate Division) stated for the Supreme Court, New York County:

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[3] Chase brief, pp. 10-11.

[4] Only when the defendants by a further showing satisfied the court that at the time of the agreements attacked, the promoters were the sole parties in interest, did Mr. Justice COLLINS reach the decision on which respondents rely. There at the time of the transactions complained of, the bankers "had made no contract to sell a single share * * * to anyone, on a 'when issued' basis or otherwise". These facts clearly distinguish Mr. Justice COLLINS' decision from the case at bar, where petitioner and the other deceived purchasers had actually contributed United's entire cash capital of $9,000,000 when the $440,000 par value of preferred stock was secretly issued to Powell and Rogers. Petition, pp. 3-6.

"*Blum* v. *Whitney*, 185 N. Y. 232, is not authority in support of the contentions of the defendants on this point. There the defendant promoters owned all of the stock of the corporation, which under the scheme of promotion was to be distributed, and it was not intended that stock would subsequently be sold to uninformed stockholders after the execution of the wrongful contract. The promoters, as the owners of all of the stock of that corporation, were in effect dealing with themselves. Here it does not appear that Seligman & Co. owned all of the stock * * *. The complaint indicates sufficiently that the promoters were not dealing with themselves alone so as to preclude subsequent stockholders from seeking redress."

II

Respondents' cases on the statute of limitations additional to those cited by the Circuit Court of Appeals are not in point on any question here in issue

In addition to the *Hastings* and *Lever* cases, which the Circuit Court of Appeals cited,[5] respondents relied in that court as well as here on *Teich* v. *Lawrence*, 291 N. Y. 245, *Gobel, Inc.* v. *Hammerslough*, 288 N. Y. 653, and *American Cities Power & Light Corp.* v. *Williams*, 69 N. Y. Supp. (2d) 197 (Supreme Court, New York County, unreported officially).

Like the *Hastings* and *Lever* cases, the *Gobel* and *Williams* cases hold no more than that § 48(5) applies only to cases of deceit,[6] a proposition not in issue either here or in the court below.

Teich v. *Lawrence* is not even remotely in point. The

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[5] These cases are discussed in note 9, petition, pp. 15-16.

[6] In the *Gobel* case, the record (pp. 109, 127) shows disclosure, not concealment and in the *Williams* case, there was concealment subsequent to the acts complained of, not deceit.

Appellate Division held the first cause of action alleged in the complaint in that case to be for "actual fraud" and so within § 48(5) because

> "respondents participated in a scheme wherein certain stock was sold to Equity Corporation's subsidiary for a grossly inflated price * * *" (265 App. Div. 974, 975).

The Court of Appeals reversed, pointing out that

> "The present complaint alleged no fraud upon the defendant corporation in whose behalf the plaintiffs sue" 291 N. Y. p. 249.

III

Certain misstatements in brief of Powell and Rogers corrected

(a) *Pp. 2, 3.* The District Court made no finding that the cause of action alleged "accrued more than 10 years before suit." The court found that the transactions complained of were "consummated * * * more than ten years prior to the institution of this suit" (R. 1267). The distinction is vital. A cause of action for deceit, such as petitioner alleged, accrues only upon discovery, but must be commenced within six years after such accrual.[7]

(b) *P. 5.* Petitioner does not admit the claim, never before advanced by respondents, that the false representations were made by United itself. The representations were made not by United, but by Morse, its president, who signed and sent the letter with the knowledge and for the benefit of Powell and Rogers,[8] who are therefore liable for the damages resulting therefrom. In each of the New York cases relied on by petitioner

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[7] The statute is set forth in Annex III to the petition.

[8] Petition, p. 4.

on this point,[9] the representations were made, as here, in connection with solicitation of the original capital of the corporation. In each case it was held that the promoters defrauded the corporation, not that the corporation defrauded itself or its original stockholders, as respondents suggest.

(c) *P. 7.* Doubtless in an attempt to make a showing in mitigation of the harsh but indisputable (and undisputed) facts set forth in the petition, respondents state that they intended and attempted unsuccessfully to resell for $1,700,000 the $2,140,000 par value of United securities which they secured at the closing for the $1,700,000 advanced to them by The Chase. And The Chase stoutly contends that the $1,700,000 was a real loan in the regular course of business which Powell and Rogers were obliged to repay, irrespective of the collateral. Thus respondents argue that Powell and Rogers obligated themselves to repay $1,700,000 with no thought of profit and solely to accommodate the bankers and the vendor companies, who on respondents' theory were the only other persons then interested in United. Be this as it may, contrary to respondents' assertion the record is devoid of evidence as to the price at which the securities were offered for resale.

(d) *P. 9.* The District Court did not hold that the transaction set forth in the petition was authorized by the charter. It discussed the charter and cited *Everett*

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[9] *Colton Improvement Co.* v. *Richter*, 26 Misc. 26, 31; *Midwood Park Co.* v. *Baker*, 128 N. Y. Supp. 954, 955, affd 144 App. Div. 939, affd 207 N. Y. 675; *Hyde Park Terrace Co.* v. *Jackson Bros. Realty Co.*, 161 App. Div. 699, 700-1; *Crowe* v. *Malba Land Co.*, 76 Misc. 676.

v. *Phillips*, 288 N. Y. 227, in connection with a completely separate *devastavit* (R. 1240, 1243), with which the appeal to the Circuit Court of Appeal was not concerned.

(e) *P. 10.* Not even a scintilla of evidence in the record substantiates the gratuitous assertion that a good sale of the properties made after the outbreak of World War II was the incentive for bringing this suit. The sale was not a good sale. As shown at pp. 1409-10 of the record filed in the Circuit Court of Appeals, but unprinted, the assets were sold for a figure which left $595,578.88 for the Class B stock, into which the old common stock had been converted, a loss of approximately 96% of the original investment of petitioner and the other purchasers. In the 77B proceedings, these stockholders had been deprived of the right to vote on the proposed sale (R. 1153, 1186, 1204-5). Furthermore, petitioner has never doubted the ability of respondents to satisfy any judgment herein.

CONCLUSION

The briefs in opposition contain no valid answer to the petition, the prayer of which should be granted.

Respectfully submitted,

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